No. 22,354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TELEDYNE, INC., APPELLANT

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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I N D E X

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JURISDICTIONAL STATEMENT

This case is before the Court on appeal from an order (R. 223-224)[1/] of the United States District Court for the Northern District of California. That Court, per the Honorable Stanley A. Weigel, United States District Judge, granted the Board's application pursuant to Section 11(2) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et seq.) for enforcement of a subpena duces tecum directed to Teledyne, Inc. (the "Company"). The district court declined to rule on the Board's alternative theory contained in Count II of the Complaint that the district court could grant injunctive relief under 28 U.S.C. Sec. 1337, to aid administrative agencies in pursuance of their statutory

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1/ "R" refers to the transcript of record.

functions. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1291 and 1294.

COUNTERSTATEMENT OF THE CASE

A. Proceedings before the Board

On November 3, 1966, the Union[2/] filed a petition with the Board's Twentieth Region in San Francisco, California, seeking to represent a unit of the production and maintenance employees at the Company's Mountain View, California, plant (R. 215).

After a hearing was held on the Union's petition, the Regional Director for the Board's Twentieth Region issued a Decision and Direction of Election. An election date was set for December 23, 1965, and the Company was ordered to furnish the Regional Director with a list of names and addresses of its employees eligible to vote within seven days after the date of the Decision and Direction of Election. The Company, however, on December 3, 1966, refused to furnish the Board with the names and addresses.

The election was conducted as scheduled, and the Union lost. The vote was 124 to 648, with 29 ballots challenged and uncounted. The Union thereupon filed an objection to the conduct of the election based upon the Company's failure to provide the list of the employees' names and addresses (R. 218). The Company opposed the objection, challenging the validity of the Board's rule requiring that the employer produce such a list on a number of statutory and constitutional grounds, and asserting that in any event, the instant election could

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2/ International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 1327.

not properly be set aside because the Union had ample opportunity to communicate with the employees at the plant and (through the mails) at their homes (R. 10-11, 73-78). The Regional Director rejected the Company's arguments, set the election aside on the basis of the above-stated objection, and directed that a rerun election be held (R. 9-13). Again, the Company was directed to supply a list of the eligible employees' names and addresses (R. 12).

The Company unsuccessfully sought to obtain Board review of the Regional Director's Decision and Direction of Second Election (R. 13, 85-93), and then refused to furnish the required list prior to the second election (R. 3). Because of the Company's refusal to produce the list, the election was indefinitely postponed pending proceedings to compel its production (R. 3).

On May 31, 1967, the Regional Director caused a subpena duces tecum to be served on the Company directing it to produce its books and records or, in the alternative, a list containing the names and addresses of its employees eligible to vote in the election (R. 16). The Company petitioned the Board to revoke the subpena, asserting substantially the same grounds raised here (R. 110-115). The Board denied the petition to revoke on June 12, and when the Company still refused to comply, the election was indefinitely postponed and this proceeding was initiated (R. 3-4, 218-219).

B. Proceedings in the District Court

The complaint filed by the Board in the court below sought enforcement of the Board's subpena or, alternatively, a mandatory injunction directing the Company to comply with the Board's election rule that in every election arising under Section 9 of the Act,

the employer must supply to the Board a list of the names and addresses of all employees eligible to vote in the election, for the use of all parties to the election (R. 1-5). The District Court, on October 11, 1967, issued findings of fact and conclusions of law enforcing the subpena, and declined to rule on the Board's alternative request for a mandatory injunction directly enforcing the Board's election rule (R. 214-222). Accordingly, on the same date, an order was entered requiring the production of the documents sought (R. 223-224).

ARGUMENT

I. INTRODUCTION

On November 29, 1967, this Court granted the Board's motion to schedule the oral argument in the instant case and the oral argument in British Auto Parts, Inc. v. National Labor Relations Board, No. 21,883, for the same day before the same panel. Since many of the issues raised by appellant herein have been fully discussed in our brief heretofore filed in No. 21,883, that brief is incorporated by reference and will be duly served upon counsel for appellant herein. The instant brief deals only with those issues raised by Teledyne not already fully considered and discussed in the Board's brief in No. 21,883.

II. THE EXCELSIOR RULE IS A VALID EXERCISE OF THE BOARD'S POWER TO REGULATE REPRESENTATION ELECTIONS

The reasons for the promulgation of the Excelsior rule have been fully set forth by the Board in the Excelsior decision itself

(Excelsior Underwear, Inc., 156 NLRB 1236), and are summarised in our brief in British Auto Parts.[3/] Here, as in British Auto Parts, the Company attacks the rule on the ground that it is a per se rule and therefore contrary to the decisions of the Supreme Court in N.L.R.B. v. United Steelworkers, 357 U.S. 357, and in N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105. We pointed out at p. 18 in our British Auto brief, however, that in those cases, the Court was dealing with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act; they clearly have no application as a limitation on the Board's power to adopt uniform election rules establishing the procedures for the expression of a free employee choice in representation elections. For, it is well settled that the Board may, by rule of decision, establish general rules for the conduct of representation proceedings. See, e.g., N.L.R.B. v. A. J. Tower, 329 U.S. 324 (rule that eligibility of voter may not be challenged after ballot has been cast); N.L.R.B. v. Hood Corp., 346 F. 2d 1020,

3/ In our British Auto Parts brief, we cited two appellate court decisions sustaining the Excelsior rule and enforcing the Board's subpenas: N.L.R.B. v. Hanes Hosiery, 384 F. 2d 188 (C.A. 4); and N.L.R.B. v. Rohlen, 385 F. 2d 52 (C.A. 7). The employer's petition for certiorari in Hanes has since been denied. See 88 S. Ct. 1041. No petition for certiorari was filed in Rohlen.

1021-1022 (C.A. 9) (rule that pre-election agreements between the parties settling questions of voter eligibility must be in writing to be binding); Foreman & Clark, Inc. v. N.L.R.B., 215 F. 2d 396, 400-401, 409-410 (C.A. 9), cert. denied, 348 U.S. 887 (rule that non-coercive pre-election speech by employer on his property, timed so as to deny union an adequate opportunity to reply under similar circumstances, is prejudicial to fair election and warrants setting election aside); N.L.R.B. v. Ideal Laundry & Dry Cleaning Co., 330 F. 2d 712, 718-719 (C.A. 10) (rule that signed ballots are void); Rockwell Mfg. Co. v. N.L.R.B., 330 F. 2d 795, 798 (C.A. 7), cert. denied, 379 U.S. 890 (rule that in elections conducted by consent of the parties, no objections will be entertained relating to electioneering conduct occurring prior to the execution of the consent election agreement); National Van Lines, Inc. v. N.L.R.B., 273 F. 2d 402, 403, 407 (C.A. 7) (rule that mail ballots received after deadline set forth in election notice will not be counted); N.L.R.B. v. Shirlington Supermarket, Inc., 224 F. 2d 649, 651-653 (C.A. 4), cert. denied, 350 U.S. 914 (similar to Foreman & Clark, supra). See also Ray Brooks v. N.L.R.B., 348 U.S. 96, 98 (rule that, absent unusual circumstances, an employer must honor a union's certification for one year even though union might have lost its majority support); N.L.R.B. v. Trimfit of California, 211 F. 2d 206, 209, n. 2 (C.A. 9) (rule that representation elections will not be conducted during the pendency of unwaived unfair labor practice charges); Milk and Ice Cream Drivers v. McCulloch, 306 F. 2d 763, 766 (C.A.D.C.) (rule that a valid collective bargaining agreement will bar an election for only the first two years

of its life); International Association of Tool Craftsmen v. Leedom, 276 F. 2d 514 (C.A.D.C.), cert. denied, 364 U.S. 815 (rule that petitions for severance elections must be coextensive with the existing bargaining unit from which a union seeks to detach specified categories of employees).

The Company's suggestion that the Board may not establish an election rule of uniform application, but must delay the election in each case for an evidentiary hearing on the necessity or desirability of applying the rule to those facts, is plainly without merit. The cases cited above show that the law is to the contrary. See, in particular, Milk and Ice Cream Drivers v. McCulloch, supra, 306 F. 2d at 766, where the court, commenting on the contention that the Board must hold an evidentiary hearing every time it applied its two-year contract bar rule to contracts of longer duration, stated, "It seems to us that this amounts to saying that due process of law does not permit the Board to establish a general rule on the subject, and this, as we have indicated, would be inconsistent with a fundamental policy of the Act . . . ." Here, the fundamental policy is that questions of representation be resolved by an informed electorate speedily, with a minimum of procedural and administrative steps which might serve to delay the election and render uncertain the finality of the results.

Teledyne also attacks Excelsior on the ground that many of its employees are highly skilled, and that their names and addresses "are valuable trade secrets" to be protected from possible disclosure

by a union to competiors. A similar argument was made in N.L.R.B. v. Rohlen, 385 F. 2d 52 (C.A. 7). In rejecting it, the Seventh Circuit said (id., at 55, n. 2):

> These objections are without substance. Nothing in the record supports the argument that disclosing the names and addresses of employees will in the future or has in the past resulted in piracy. A union that is bent on engaging in such unconscionable practices will surely not be deterred by the unavailability of an Excelsior list. And as the Board stated in a different context, equally relevant to employee piracy, "We cannot assume that a union, ... will engage in conduct of this nature; if it does, we shall provide an appropriate remedy.

That answer is equally applicable here. In any event, the Company's claimed necessity for secrecy is belied by the encouragement it gave its employees to provide their names and addresses on a voluntary basis to the Board for transmission to the Union.

Equally insubstantial is appellant's claim that the Excelsior rule invades a constitutionally protected "zone of privacy" of its employees. In the first place, the Company does not have standing to raise this defense because it belongs to persons who are not parties to this proceeding. Unlike N.A.A.C.P. v. Alabama, 357 U.S. 449, and the other cases cited at pp. 26-27 of the Company's brief, there is no identity of interest here between Teledyne and its employees, nor will Teledyne suffer any injury by producing the

required list. See pp. 12-14 of our brief in British Auto Parts. Assuming for the moment that the employees have a broad constitutional right "to be free from unwanted or bothersome intrusions", as their employer claims (Co. Br. p. 25), they can protect it simply by closing the door on the visitor or hanging up on the caller when they determine that he is unwanted or bothersome.

Secondly, Excelsior is not unconstitutional. If the sale by a state of the names and addresses of motor vehicle registrants to the highest bidder for commercial purposes does not violate any constitutional right of the registrants (see Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D. N.Y.)), then, a fortiori, giving the parties to an election the voters' names and addresses does not violate the voters' constitutional right of privacy. As stated by Judge Frankel in Lamont, supra, at 883:

> The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect "the privacies of life." The short, though regular, journey from mail box to trash can -- for the contents of which the State chooses to pay the freight when it facilitates the distribution of trash -- is an acceptable burden, at least so far as the Constitution is concerned. And the bells at the door and on the telephone, though their ring is a more imperious nuisance than the

mailman's tidings, accomplish more peripheral assaults than the blare of an inescapable radio /see Public Utilities Commission v. Pollak, 343 U.S. 451/.[4]

III. THE BOARD'S ADOPTION OF THE EXCELSIOR RULE DID NOT CONTRAVENE THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

Finally, the Company seeks to have the Court void the Excelsior requirement on the ground that the Board did not comply with the rule-making provisions of the Administrative Procedure Act (5 U.S.C. Sections 552, 553 (1967)). The district court's rejection of this argument is fully supported by the relevant case law.

It is well settled that the Board has authority both to promulgate rules legislatively under Section 6 of the National Labor

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4/ Teledyne's suggestion that Public Utilities Commission v. Pollak, supra, was impliedly overruled by Griswold v. Connecticut, 381 U.S. 479, because Justice Douglas, who dissented in Pollak, wrote the majority opinion in Griswold, need not give this Court much pause. Griswold deals only with governmental interference in the most personal relationships between husband and wife; nothing in the opinion of the Court purports to lay down the broad rule Teledyne is promoting that governmental action is unconstitutional simply because it might result in an unwanted letter, telephone call or knock on the door at a person's home.

Relations Act and to proceed by rule of decision, on a case-by-case basis, under Section 9 and 10 (29 U.S.C. Secs. 156, 159, 160). See S.E.C. v. Chenery Corp., 332 U.S. 194, 201-203; N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344, 347-349; Foreman & Clark, Inc. v. N.L.R.B., supra, 215 F. 2d at 409-410; N.L.R.B. v. Pittsburgh Plate Glass Co., 270 F. 2d 167, 174 (C.A. 4), cert. denied, 361 U.S. 943; N.L.R.B. v. A.P.W. Products Co., 316 F. 2d 899, 905 (C.A. 2); N.L.R.B. v. Penn Cork & Closures, Inc., 376 F. 2d 52, 57 (C.A. 2); N.L.R.B. v. E & B Brewing Co., Inc., 276 F. 2d 594, 598 (C.A. 6), cert. denied, 366 U.S. 908; Optical Workers Union v. N.L.R.B., 227 F. 2d 687, 690-691 (C.A. 5), cert. denied, 351 U.S. 963.[5/] When the Board elects to proceed by rule of decision, as it did in Excelsior, the publication and rule-making provisions of the APA have no application. See N.L.R.B. v. A.P.W. Products Co., supra, 316 F. 2d at 905; N.L.R.B. v. Penn Cork & Closures, Inc., supra, 376 F. 2d at 57;

5/ In exercising its authority under Section 9(c) of the Act, the Board has "evolved a number of working rules" through the decisional process. Ray Brooks v. N.L.R.B., 348 U.S. 96, 98. As shown by the cases cited ante, pp. 5-7 , many of the Board's decisional rules are, like Excelsior, directed to establishing the conditions for a fair and free expression of employee choice in representation elections. One of the best known is the rule announced by the Board in its decision in Peerless Plywood, 107 NLRB 427, that no campaign speeches shall be made in the last 24 hours before a Board-directed election. See N.L.R.B. v. Dallas City Packing Co., 251 F. 2d 664, 666 (C.A. 5).

N.L.R.B. v. E & B Brewing Co., Inc., supra, 276 F. 2d at 598. The Board thus acted wholly within the scope of its discretion by promulgating the Excelsior rule in an adjudicative proceeding and by applying it to the instant case.

Appellant relies heavily on Hotch v. United States, 212 F. 2d 284 (C.A. 9), for the proposition that the Board's failure to publish the Excelsior rule in the Federal Register makes it invalid. That case, however, is distinguishable on several counts. The strict requirement of publication could be justified there because it was a criminal case, whereas this case is not. Portage Broadcasting Corp. v. FCC, 326 F. 2d 674, 690 (C.A.D.C.). Furthermore, it cannot be said that the Company here has been prejudiced in any way by the failure to publish. Reich v. Webb, 336 F. 2d 153, 159 & n. 7 (C.A. 9); FCC v. Schreiber, 329 F. 2d 517, 528, modified and remanded on another ground, 381 U.S. 279. The Company knew, at least from the time of the issuance of the direction of election, that the Board required production of an appropriate list of names and addresses. See R. 8, n. 2. The record shows that the Company has had many opportunities to challenge the rule and to argue why it should not apply in this case, and has taken advantage of them. The Board has heard and rejected these arguments.

In addition, the Company's claim (Br. p. 30) that it is not bound by the rule in Excelsior since it was not given an opportunity to be heard in that case is equally lacking in merit. Before promulgating the rule, the Board invited and accepted amicus curiae

briefs from "interested parties" (156 NLRB at 1238) -- included in this group were the Chamber of Commerce of the United States and the National Association of Manufacturers, both of which represent the interests of management. Even now, the Company does not suggest that it has any objections to the Excelsior rule which were not advanced by others in that case. Judge Leventhal's comments in City of Chicago v. FPC, 385 F. 2d 629, 643 (C.A.D.C.), are particularly appropriate here:

> On this record /the Company/ shows no substantial ground for a difference in result because the agency declared a general principle in the context of an individual proceeding, but with leave to the industry to participate amicus curiae; it was free to utilize this technique notwithstanding the efforts of courts and scholars to encourage greater use of regulations for broad policy declaration.

The choice between adjudication and rule making is "a question of judgment, not of power" N.L.R.B. v. A.P.W. Products Co., 316 F. 2d at 905; and where, as here, the Company has been given notice and an opportunity to defend, the agency's choice should not be disturbed.

IV. THE DISTRICT COURT PROPERLY ENFORCED THE BOARD'S SUBPENA

Relying primarily on the district court decision in N.L.R.B. v. Q-T Shoe Co., 67 LRRM 2356 (D. N.J.), appeal pending (C.A. 3, Docket No. 17,203), the Company asserts that the Excelsior list sought in this case is not evidence within the meaning of Section 11 of the Act because it will not be used by the Board to prove or disprove anything in dispute before the Board, but will merely be turned over to the Union for the latter's use during the pre-election campaign. Accordingly, appellant's argument goes, the Board cannot use its subpena powers to procure the employees' names and addresses.

A similar argument was made in British Auto Parts, and is answered at pp. 28-32 of the Board's brief therein. The Board's response can best be summarized in the following quotation from N.L.R.B. v. Rohlen, supra, 385 F. 2d at 57:

> Section 11(2) itself reveals the erroneous nature of the company's contention. The crucial words in that section are "to produce evidence . . . or . . . give testimony touching the matter under investigation or in question." From this language, it is clear that a party can be requested, by virtue of a subpoena, "to produce evidence" concerning a "matter under investigation." When this rather obvious observation is coupled with the commonly accepted function of an investigation, the gathering of facts and information, the company's position becomes untenable. The company would read the words just quoted without the phrase "under investigation." A more appropriate reading

would place primary emphasis on those words. Thus, if the material subpoenaed touches a matter under investigation, it is within the scope of section 11(2) even though the material may not be considered "evidence" as the term is employed in the courtroom.

Moreover, the list of employee names and addresses is evidence relating to a "matter . . . in question." Even if we adopt the orthodox view that evidence tends to prove or disprove the existence of a disputed fact or something in issue, the "something in issue" in a representation proceeding under section 9 is the employee group-preference. An Excelsior list, by faciliating a fully informed electorate, is evidence which aids in the establishment of that group-preference.

The district court in Q-T Shoe ignored Rohlen, as well as N.L.R.B. v. Hanes Hosiery, supra, although both cases were called to its attention. Teledyne attacks Rohlen on the ground that the Seventh Circuit erred in stating that the basic issue in a representation proceeding -- i.e., the matter under investigation -- is the employee group-preference (Co. Br. p. 13). It is settled, however, that the entire representation proceeding, from the preliminary determination of "probable cause to believe that a question of representation affecting commerce exists" through certification of the results of the election, is an "investigation" within the meaning of Sections 9(c) and 11 of the Act. See, e.g., Inland Empire District Council v. Millis, 325 U.S. 697, 706; N.L.R.B. v. Duval Jewelry Co., 243 F. 2d 427, 431 (C.A. 5), aff'd on this point, 357 U.S. 1; Kearney & Trecker Corp. v. N.L.R.B., 209 F. 2d 782, 786 (C.A. 7). Accordingly, it is the

Company that errs when it claims that there is nothing at issue before the Board to which the list is pertinent.[6/] As indicated above, the ultimate question to be resolved in this representation proceeding is what choice the employees will express under free and fair election procedures. Until that question has been resolved, the Board representation investigation under Section 9(c) is not complete and the predicate for issuance and enforcement of Board subpenas under Section 11 is not exhausted. See Cudahy Packing Co. v. N.L.R.B., 117 F. 2d 692, 693 (C.A. 10).

The Company also claims that if the Board can subpena the names and addresses of employees in order to aid them to make a more intelligent choice in the election, it can subpena any information in the Company's possession which the Board might deem helpful to a union in its organizing campaign, such as the employer's cost and profit figures. This argument misconceives the nature of the Board's role in representation proceedings. The Board's function is to regulate the election process so that the employees will be in a position to vote intelligently, not to aid the parties to formulate their campaign material. The Excelsior rule was adopted to open up avenues of communication between the parties and the electorate on the assumption that employees will thereby be better able to make a more fully

6/ The Company asserts (Br. 13) that there is no need for the Excelsior list because the election has been held and there were no objections to conduct and no challenged ballots sufficient to affect the results of the election. This argument ignores the fact that the first election was set aside and a second election directed for which there will be a new eligibility list and a new pre-election campaign.

informed and reasoned choice. The Board only gets involved in the substance of a pre-election campaign if it is alleged that there has been conduct which made such a choice impossible.

V. THE COMPANY HAS NOT SUBSTANTIALLY COMPLIED WITH EXCELSIOR

The Company's final argument (Br. 31) is that it has substantially complied with Excelsior, and that enforcement of the subpena should therefore be denied. To support this assertion, the Company apparently relies on three factors: (1) that it had a policy of permitting employees to campaign for and against union representation on company time and property so long as the campaigning did not interfere with their work; (2) that it provided employees with stamped, addressed envelopes with which they could mail their names and addresses to the Board; and (3) that it offered to provide an independent third party to mail the Union's literature to its employees.

In adopting the Excelsior rule, however, the Board considered all of these alternatives and rejected them as not providing an adequate substitute for making known to the union directly the names and addresses of all the eligible employees. The Board said (Excelsior Underwear, Inc., 156 NLRB 1236, 1241):

> This is not, of course, to deny the existence of various means by which a party might be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious -- that the access of all employees to such communications can be insured only if all parties have the names and addresses of all the voters.

/In a footnote to the foregoing, the Board added:/

> A union that does not know the names and addresses of some of the voters may seek to communicate with them by distributing literature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media of communication. The likelihood that all employees will be reached by these methods is, however, problematical at best. * * * Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than the above methods, suffers from the limited periods of nonworking time available for solicitation . . . and, in a large plant, the sheer physical problems involved in communicating with fellow employees.

With regard to the Company's offer to provide the list to a mailing service which would send out the Union's literature, the Board said in Excelsior (id., at 1246):

> We do not limit the requirement of disclosure to furnishing employee names and addresses to a mailing service . . . because this would create difficult practical problems and because we do not believe that the union should be limited to the use of the mails in its efforts to communicate with the entire electorate.

In sum, while the Board does not apply the Excelsior rule mechanically in that erroneous listings or late filing will not automatically be construed as noncompliance with the rule, the Board

has not accepted as a substitute for compliance those very devices which it found to be inadequate in the first place.

VI. THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND ADVANCED BY THE BOARD

Count II of the Board's complaint in the district court requested the issuance of a mandatory injunction directly enforcing the Excelsior rule, to aid the Board in pursuing its statutory functions (R. 4). The district court, upon granting enforcement of the subpena duces tecum under Count I, declined to rule on Count II. Nevertheless, this Court could affirm the district court on this alternative ground. M.O.S. Corp. v. John I. Haas Co., 375 F. 2d 614, 617 (C.A. 9), and cases cited; S & S Logging Co. v. Barker, 366 F. 2d 617, 623 (C.A. 9). For the reasons already discussed in our British Auto Parts brief (pp. 29-35), we submit that the judgment of the district court may be affirmed on this alternative ground.

CONCLUSION

For the reasons stated herein and in the Board's brief in British Auto Parts v. N.L.R.B., No. 21,883, we respectfully submit that the District Court properly ordered the Company to file with the

Regional Director the names and addresses of the employees in the unit, in compliance with the Excelsior rule and the Board's subpena.

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May 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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